INDEX

Motion for Leave to File a Second Petition for Rehearing 1
Petition for Rehearing 3
Certificate of Service 8
Certificate of Counsel 8
Appendix A1

Cases Cited

United States v. *Ohio Power Company*, 353 U.S. 98 2
Zap v. *United States*, 330 U.S. 800 2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 585

FEDERAL POWER COMMISSION,
Petitioner,

VS.

AMERADA PETROLEUM CORPORATION,

AND

SIGNAL OIL AND GAS COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION FOR LEAVE TO FILE A SECOND PETITION FOR REHEARING

And he that will not apply New Remedies, must expect New Evils: For Time is the greatest Innovatour.

Bacon, *Of Innovations.*

Amerada Petroleum Corporation and Signal Oil and Gas Company, Respondents herein, respectfully move this Court to grant leave to file the attached Petition for Rehearing of this Court's opinion dated February 1, 1965.

Permission to file this Petition for Rehearing is requested because the Federal Power Commission's decision in *Transcontinental Gas Pipe Line Corporation*, Docket No. CP63-222 (Opinion No. 449) represents a complete turnabout in Commission policy with respect to its jurisdiction over commingled gas. We had not received Opinion 449 when we mailed our original Petition for Rehearing to the printer. But Opinion 449 has a vital and direct bearing on the case at bar because it reflects a new Commission policy applicable to commingling cases. The application of this new doctrine to the facts of our case by a newly constituted Commission, a majority of whose members were not sitting when the case at bar was decided below, would result, we submit, in a total disclaimer of jurisdiction. We therefore respectfully ask this Honorable Court to judge our case in the light of this significant change in Commission thinking. Although Rule 58 does not contemplate the filing of a second petition for rehearing, this Court clearly has the power, in its discretion, to entertain such a petition, *Zap* v. *United States*, 330 U.S. 800 and *United States* v. *Ohio Power Company*, 353 U.S. 98, and we urgently move for leave to file.

Respectfully submitted,

.....

JOSEPH W. MORRIS

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 585

FEDERAL POWER COMMISSION,
Petitioner,
vs.
AMERADA PETROLEUM CORPORATION,
AND
SIGNAL OIL AND GAS COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR REHEARING

By leave of this Court, Amerada Petroleum Corporation (Amerada) and Signal Oil and Gas Company (Signal), Respondents herein, respectfully file this Petition for Rehearing of this Court's opinion dated February 1, 1965.

REASONS FOR GRANTING REHEARING

The Federal Power Commission's recent decision in Transcontinental Gas Pipe Line Corporation, Docket No. CP63-222 (Opinion No. 449) represents, so far as principle is concerned, a 180 degree reversal in policy concerning the legal effect of gas commingling. Although the Commission

attempts to distinguish certain of the commingling cases from its Opinion 449, a reading of that opinion, which is printed in the Appendix hereto, clearly demonstrates that the Commission has taken an approach which is diametrically opposed to the approach taken by the Commission when the case at bar was before it.

In Opinion 449, Texaco, Inc. (Texaco) entered into a contract with Transcontinental Gas Pipe Line Corporation (Transco) whereby Texaco would deliver daily, certain quantities of gas owned by it to Transco at two points of delivery in the Gulf Coast area of Texas and Louisiana. The Texaco gas was to be *commingled* in the Transco line with gas sold *in interstate commerce*. A volume of gas equivalent to the volume delivered by Texaco was to be redelivered by Transco to Texaco in New Jersey for use in Texaco's refinery. "It is the intention of the parties that the daily deliveries of gas by Texaco for transportation shall approximately equal the amount of gas which Texaco shall receive at the New Jersey delivery point. Under Article 8 of the agreement, the parties recognize that the gas delivered by Texaco *will be commingled* with gas received from *other sources* in Transco's pipeline." (App. p. A5).[1]

With these facts before it the Commission concluded that:

> ". . . the *mere physical commingling* of Texaco's gas in Transco's lines with gas Transco has purchased for subsequent resale does *not* compel rejection of historic notions of bailments and require us to transform the transportation agreement into a succession of sales by Texaco to Transco and again by Transco to Texaco. An essential feature of this transaction is that Texaco is the owner of the gas both at the beginning and the end of its journey from the wellhead to the point of ultimate consumption. It has merely contracted for conventional transportation arrangements subject to

1. All emphasis contained herein is supplied by the writers unless otherwise indicated.

> the Commission's jurisdiction. While transfers of gas from a producer to a pipeline or from a pipeline to a direct customer may be treated as a sale for regulatory purposes in appropriate circumstances, we see no reason to do so in the circumstances of this case where it is clear that the intermediate transactions result in returning the gas to the original producer-owner and *no jurisdictional question is involved.*" (App. p. A7).

Contrast this holding to the Commission's rationale in the case at bar; it is remarkable. For in our case the Commission's singularly important reason for holding our intrastate sales under our North Dakota Contracts to be jurisdictional was that the gas sold thereunder was *commingled* with jurisdictional gas from *other sources*. The majority of the Commission put it this way:

> "There is, however, a distinction in the present case which, even though not mentioned as such by the examiner, is clearly apparent from his discussion. This is the fact that here the Amerada and Signal gas is *now commingled* with gas from Texaco and Hunt-Herbert *admittedly sold in interstate commerce*, so that it can no longer be stated with certainty that all of the gas sold in North Dakota came from Amerada and Signal. Indeed, it is apparent that a portion of the Amerada and Signal gas is transported and sold to purchasers within Montana while some of the Texaco and Hunt-Herbert gas is used within North Dakota." (R. 249-250).

Thus today, almost two years after the Commission's decision below in the case at bar, the Commission's view of the effect of commingling has completely changed. For today, the delivery and commingling of non-jurisdictional gas with interstate gas in the Transco pipeline and the redelivery by Transco to Texaco of an equivalent volume of gas in New Jersey does not convert the non-jurisdictional gas into jurisdictional gas. Indeed the Commission regards the separation of this non-jurisdictional gas, though it is

commingled with jurisdictional gas, to be so complete that it refers to "*the gas*" which is delivered in Texas as being "*the gas*" which is redelivered in New Jersey. It says:

> "An essential feature of this transaction is that Texaco is the owner of *the gas* both at the beginning and the end of its journey from the wellhead to the point of ultimate consumption.
>
> * * * *
>
> "'. . . it is clear that the intermediate transactions result in returning *the gas* to the original producer-owner and no jurisdictional question is involved." (App. p. A7).

We respectfully submit, and it cannot be logically refuted, that if "the gas" delivered to Transco in Texas is "the gas" redelivered in New Jersey, commingled though it was en route with jurisdictional gas from other sources, then "the gas" delivered by Amerada and Signal at the tailgate of the Tioga, North Dakota, plant under the North Dakota Contracts is "the gas" metered off and delivered to the North Dakota towns as it travels to the west; commingling with the Texaco and Hunt-Herbert gas en route does not and cannot convert it into a jurisdictional sale. We respectfully submit that the principle involved is precisely the same; these cases simply cannot be distinguished on principle.

When the Commission handed down its opinion below in the case at bar, it was sharply divided, with three (3) of the Commissioners holding that the sales were jurisdictional and two (2) of the Commissioners holding that they were not (R. 242-265). Commissioner Howard Morgan voted with the majority in Opinion 395 which was handed down on July 15, 1963. Subsequent thereto, but prior to the Order Denying Application for Rehearing entered on September 10, 1963, Commissioner Morgan was succeeded by Commissioner Black. Commissioner Black did not participate in the Order Denying Application for Rehearing (R. 284-285).

On March 20, 1965, President Johnson appointed Mr. Carl E. Bagge as a new member of the Commission. Today, therefore, only two (2) members of the Commission as presently constituted have held that the Amerada and Signal sales under the North Dakota Contracts are jurisdictional.

We respectfully submit that in view of the new commingling pronouncement made in Opinion 449, it is only reasonable to believe that the Commission would now hold the Amerada and Signal North Dakota sales to be non-jurisdictional. Because of this new turn of events and in view of the fact that Opinion 449 was not available to us when we filed our first Petition for Rehearing, we respectfully pray that this Honorable Court grant rehearing in the case at bar and afford us the opportunity to brief and argue this case in light of this vitally important new turn of events. If, notwithstanding this important change in Commission attitude, this Honorable Court is still of the opinion that rehearing should not be granted, we respectfully pray that instead of reversing this case outright, that the case be remanded to the court below with instructions to remand the case to the Commission for decision anew in view of its most recent pronouncement.

Respectfully submitted,

EDWIN S. NAIL,
ROBERT E. SLOAN,
JOSEPH W. MORRIS,
P. O. Box 2040,
Tulsa 2, Oklahoma,
WILLIAM R. ALLEN,
1010 Wilshire Boulevard,
Los Angeles, California 90017,
CECIL E. MUNN,
1800 First National Building,
Fort Worth, Texas 76102.

CERTIFICATE OF SERVICE

I, Joseph W. Morris, one of the attorneys for Amerada Petroleum Corporation, one of the Respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 31st day of March, 1965, I served five copies of the foregoing Motion for Leave to File a Second Petition for Rehearing and Petition for Rehearing upon each of the following parties by air mail, postage prepaid:

Archibald Cox
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

Richard W. Solomon
General Counsel
Federal Power Commission
Washington 25, D. C.

.....

JOSEPH W. MORRIS

CERTIFICATE OF COUNSEL

I, Joseph W. Morris, one of the attorneys for Amerada Petroleum Corporation, certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

.....

JOSEPH W. MORRIS

APPENDIX

UNITED STATES OF AMERICA FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman; L.J. O'Connor, Jr., Charles R. Ross and David S. Black.

Transcontinental Gas Pipe Line Corporation	Docket No. CP63-222

Opinion No. 449
Opinion and Order Granting Certificate

(Issued February 17, 1965)

ROSS, Commissioner:

This is a proceeding under Section 7 of the Natural Gas Act. Transcontinental Gas Pipe Line Corporation (Transco) seeks a certificate of public convenience and necessity to transport gas owned and produced by Texaco Inc., in volumes of 8,000 Mcf per day of firm gas and up to 16,000 Mcf per day of interruptible gas, from two points of receipt in the Gulf Coast area of Texas and Louisiana to a point of delivery on Transco's system near Texaco's Eagle Point Refinery located at Westville, Gloucester County, New Jersey, by means of Transco's main line facilities connecting these two areas. Texaco plans to convert the refinery from the use of fuel oil to natural gas in order to lower operating costs. The initial rates proposed by Transco are the same rates as those charged Sun Oil Co. for similar transportation service. The firm rate is the contract demand rate for Zone 3, exclusive of the

average cost of purchased gas. The interruptible rate is 22 cents per Mcf. Overall, the service would earn an incremental return of over 12½ per cent.

In connection with the proposed service Transco requests authority for the construction and operation of additional pipeline facilities consisting of 10.5 Miles of 8 inch purchase lateral in southeast Louisiana, two gathering meter and regulator stations at the points of receipt and a sales meter and regulator station at the point of delivery. The additional facilities required are estimated to cost approximately $600,000. Other facilities originally requested in this proceeding have since been authorized by the order issued April 17, 1964, in *Transcontinental Gas Pipe Line Corporation*, Docket No. CP64-96.

On June 5, 1964, Presiding Examiner Dyer Justice Taylor issued an initial decision granting Transco's application subject to certain specified conditions regarding curtailments and priority of service. Transco, in its brief opposing exceptions, indicates that the conditions imposed by the examiner are deemed appropriate and are acceptable to it.

Exceptions to the examiner's decision were filed jointly by and on behalf of seven intervening local gas distribution companies[1] and by the Board of Public Utility Commissioners of the State of New Jersey, which adopted the exceptions and the reasons stated in the joint brief on exceptions filed by the distribution company intervenors. The Commission's staff, which supported the award of the certificate to Transco, did not except to the

---

1. City Gas Company of New Jersey, Elizabethtown Consolidated Gas Company, New Jersey Natural Gas Company, Philadelphia Electric Company, Philadelphia Gas Works Division of The United Gas Improvement Company, Public Service Electric and Gas Company, and South Jersey Gas Company.

intermediate decision. By order of August 25, 1964, the Commission scheduled oral argument on the issues raised by exceptions to the examiner's initial decision. These issues were directed to whether the proposed transportation was required by the public convenience and necessity. In addition, the Commission raised *sua sponte* an issue relating to the nature of the transaction between Transco and Texaco and provided for the filing of briefs on this issue. Specifically, the issue raised was:

> "Whether the arrangement between Texaco and Transco involves a sale of gas by Texaco to Transco for resale by the latter so that the producer should be required to secure a certificate."

At the oral argument and in the supplemental briefs, Transco and Texaco contended that the so-called commingling doctrine of the Commission had been rejected by both the Fifth and Eighth Circuits.[2] Moreover, they argued that this doctrine had been applied only to determine whether or not what was admittedly a sale by the producer in the first instance, was a sale for resale in interstate commerce. This situation is distinguishable, they point out, in that the transaction concededly is in interstate commerce. After describing the several transportation agreements previously approved by the Commission, these parties argued that public policy dictated against expanding the commingling doctrine to cases of this type.

Staff and the New Jersey intervenors[3] took a contrary view of the nature of the transaction between Transco and Texaco. In their view, the instant agreement comprised a sale in the field by Texaco to Transco, and a resale in Westville, N.J. by Transco to Texaco. Under the Com-

---

2. *LoVaca Gathering Company* v. *FPC*, 323 F.2d 190 (1964); *Amerada Petroleum Corporation* v. *FPC*, 334 F.2d 404 (1964).

3. These parties are identified in footnote 1, *supra*.

mission's commingling doctrine, they indicate that physically a part of the gas initially delivered by Texaco to Transco will be resold by Transco to various of its wholesale customers served by its main line facilities. In support of this position, they note that Transco, under the agreement, bears the risk of loss while the gas is in transit, except for loss due to force majeure. The New Jersey intervenors argued various points indicating, in their opinion, why the proposed arrangement was not consistent with the public interest.

We conclude that the transaction between Transco and Texaco is a transportation agreement and that the public convenience and necessity requires certification of the proposed transportation service under Sections 7(c) and 7(e) of the Natural Gas Act.

The part of the Natural Gas Act covering the issue raised *sua sponte* is Section 7(c) which provides:

> "No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations"

Considering the fact that the pipeline industry had evolved to a considerable extent by the time Congress enacted the Gas Act, it is noteworthy that the term "transportation" was specifically included. In the past, the Commission has approved several transportation arrangements of a type similar to that presented here. At the present time, there are 25 transportation rate schedules on file with the Commission by 13 different pipelines.

Under the agreement executed by Transco and Texaco, and filed herein as Exhibit No. 8 Transco agrees to transport for Texaco daily from points of delivery in the Gulf Coast area to the Westville plant in New Jersey such quantities of gas on a firm basis as Texaco makes available to such delivery points up to 8,000 Mcf per day, and up to 16,000 Mcf per day on an interruptible basis. Departure from scheduled daily deliveries due to the inability of the parties to maintain precise control must be kept to the minimum and balanced out as soon as practicable. It is the intention of the parties that the daily deliveries of gas by Texaco for transportation shall approximately equal the amount of gas which Texaco shall receive at the New Jersey delivery point. Under Article 8 of the agreement, the parties recognize that the gas delivered by Texaco will be commingled with gas received from other sources in Transco's pipeline. However, the parties agree that the quantity of the gas delivered by Transco to Texaco shall be comparable to that initially delivered by Texaco. Article 9 provides detailed measuring requirements respecting both the quantity and quality of the gas delivered by Texaco to Transco and redelivered by Transco to Texaco. Of course, these contractual provisions do not control our jurisdictional determination.[4]

Transco is not liable for any gas gathering, occupation or production, severance or sales tax or taxes of similar nature presently or hereafter validly imposed. In addition, Texaco is obliged to reimburse Transco in the amount of any future tax validly paid by Transco incurred in connection with the proposed transportation. Under Article 10, the parties agree to share the loss of any gas resulting

---

4. 26 FPC 606. The Commission's decision was recently sustained by the Supreme Court in *California* v. *LoVaca Gathering Co., et al.*, U.S. , Docket Nos. 46, *et al.*, decided Jan. 18, 1965.

from force majeure. Otherwise, the agreement places the risk of loss with Transco. Texaco warrants clear title to the gas to be delivered to Transco and Transco warrants that the gas shall be free of all liens when delivered to Texaco. Nothing in the agreement purports to transfer title to the gas delivered by Texaco to Transco. Texaco receives no consideration whatever under the agreement. The only obligation is Texaco's obligation to pay the agreed rate to Transco in return for the transportation of gas of a specified volume and quality.

The terms of this agreement conform generally to other transportation agreements we have approved. Texaco simply desires to transport gas it owns and has developed to a point where it can economically use the gas. It therefore has entered an arrangement with one who has the facilities capable of transporting the gas. We conclude that in the light of the facts of this case, the instant situation does not involve a sale by Texaco to Transco.

Staff and the New Jersey Intervenors argue that our decision in *LoVaca* requires us to view the instant transaction as one involving a sale by Texaco to Transco and a (nonjurisdictional direct industrial) resale by Transco to Texaco. In essence, Staff reaches this conclusion on the basis of commingling, i.e., different molecules of gas being redelivered by Transco to Texaco. We disagree with this position.[5]

Initially, we note that the issue present in *LoVaca*, *supra*, was whether arrangements, which concededly were sales, were in interstate commerce or for resale, and hence subject to Federal regulation under the Natural Gas Act.

---

5. Footnote 4, *supra*. See also *FPC* v. *Amerada Petroleum Corp., et al.*, ... U.S. ..., Docket No. 585, per curiam opinion decided February 1, 1965.

The issue here, on the other hand, is whether in the circumstances of this case there is any sales relationship between Texaco and Transco which is subject to Commission jurisdiction as such, or whether the proposed transaction is a transportation service under Sections 4, 5 and 7 of the Act.

We conclude that the mere physical commingling of Texaco's gas in Transco's lines with gas Transco has purchased for subsequent resale does not compel rejection of historic notions of bailments and require us to transform the transportation agreement into a succession of sales, by Texaco to Transco and again by Transco to Texaco. An essential feature of this transaction is that Texaco is the owner of the gas both at the beginning and the end of its journey from the wellhead to the point of ultimate consumption. It has merely contracted for conventional transportation arrangements subject to the Commission's jurisdiction. While transfers of gas from a producer to a pipeline or from a pipeline to a direct customer may be treated as a sale for regulatory purposes in appropriate circumstances, we see no reason to do so in the circumstances of this case where it is clear that the intermediate transactions result in returning the gas to the original producer-owner and no jurisdictional question is involved. In reaching this determination we do not decide the status of the other types of transactions, such as that presented in the X-20 case.[6]

LoVaca raised the possibility of a situation whereby substantial volumes of gas moving in interstate commerce would escape federal regulatory authority. Under the proposal, a pipeline would have been able to discriminate in favor of "nonjurisdictional" customers and could immunize a particular supplier from the reach of federal regulation. In these and in other ways, the Supreme Court

---

6. *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1.

noted, an attractive gap in the federal regulatory scheme would be created. Such a danger is not present in this case. The Commission has full and complete authority over the transportation agreement, and Texaco could not inject one Mcf of gas into Transco's interstate pipeline unless the Commission is satisfied that the transportation service is required by the public interest.

We have reviewed the record in this proceeding and conclude that the proposed service is required by the public convenience and necessity within the meaning of Sections 7(c) and 7(e) of the Gas Act. In our view, the presiding examiner properly treated these issues and we will therefore adopt this decision.

There are certain beneficial features of this transaction that we wish to emphasize. The present transaction precludes triggering of Transco's gas purchase contracts covering gas produced in Texas which might otherwise occur under a typical gas purchase contract. In addition, the instant arrangement allows the parties considerable operating flexibility in that specific leaseholds are not dedicated. The proposed service also will benefit Transco's other jurisdictional customers from a cost standpoint. The record indicates that the jurisdictional transportation revenues will exceed the associated incremental costs by about $600,000 annually.

None of the foregoing benefits would be available to Transco's jurisdictional customers if the proposed transaction were viewed as a sale from Texaco to Transco and a resale back to Texaco. The latter would be a nonjurisdictional direct industrial sale and hence immune from consideration in a rate proceeding.

On November 18, 1964, Public Service Electric and Gas Company, one of the intervenors in this proceeding,

filed a document entitled "Offer of Settlement and Reasons for Acceptance". In this document, Public Service requested the Commission to order an informal settlement conference which would permit Public Service to offer a rate designed to meet the conditions of service satisfactory to Texaco and Transco. Public Service also suggested that it could offer a resale price of 42.9 cents per Mcf to Texaco. As Texaco correctly pointed out in its answer in opposition, Public Service's request is nothing more than an attempt to present an entirely new affirmative case almost one year after the record has been closed and the case briefed and submitted for decision. In addition the rate suggested by Public Service, even if reliable, is unsatisfactory to parties. For these reasons, we shall deny the relief requested by Public Service.

The Commission orders:

(A) The presiding examiner's decision and order issued herein on June 5, 1964, is hereby adopted as the decision of the Commission with respect to the public interest aspects of the application.

(B) The exceptions to the examiner's decision are hereby denied.

(C) The relief requested by Public Service Electric & Gas Co. in its "Offer of Settlement" filed November 18, 1964, is denied.

By the Commission. Commissioner O'Connor concurs in the result.

(SEAL)

Joseph H. Gutride,
Secretary.